No. 97-1795

In The

# Supreme Court of the United States

October Term, 1997

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC., RICHARD BUCHANAN, CHAD BUSH, EDWIN GREENE, RITA MATHIS, ROGER ASTERINO, and H.O.M.E., INC.,

*Petitioners,*

v.

THE CITY OF CINCINNATI, EQUAL RIGHTS NOT SPECIAL RIGHTS, MARK MILLER, THOMAS E. BRINKMAN, JR., and ALBERT MOORE,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether a decision by a local electorate to do away with local laws granting homosexuals "minority or protected status, quota preferences or preferential treatment" facially violates the Fourteenth Amendment because either (1) all decisions to deny homosexuals such status are inherently irrational or (2) the local electorates may never require their subordinate representatives to implement constitutionally-permissible substantive decisions.

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## BRIEF IN OPPOSITION

Respondents Equal Rights, Not Special Rights, Mark Miller, Thomas E. Brinkman, Jr., and Albert Moore respectfully submit this brief in response to the petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit filed on May 4, 1998, by petitioners Equality Foundation of Greater Cincinnati, Inc.; Richard Buchanan; Chad Bush; Edwin Greene; Rita Mathis; Roger Asterino; and H.O.M.E., Inc.

## COUNTERSTATEMENT OF THE CASE

Petitioners' Statement of the Case omits and misstates information concerning the factual and legal background and context of this case.

### I. The History and Factual Background of Issue 3

This case is about a disagreement between the people of Cincinnati and their elected representatives on the City Council over the question of whether or not homosexuals ought to be protected under Cincinnati's civil rights laws. On March 13, 1991, the City Council enacted Ordinance No. 79-1991, commonly known as the Equal Employment Opportunity Ordinance ("EEO Ordinance"), which prohibits the City of Cincinnati, in its capacity as a public employer, from discriminating in employment matters on the basis of, among other criteria, sexual orientation. Jt. App. 668.[1] On November 25, 1992, the City Council

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[1] References to the petition for a writ of certiorari filed by petitioners will be noted as "Pet." References to the Joint Appendix before the court of appeals will be described as "Jt. App." Joint Exhibits not included in the Joint Appendix will be referred to as "Jt. Exh." The full record in the district court will be referred to as "R."

passed Ordinance No. 490-1992, the so-called Human Rights Ordinance ("HRO"), which prohibits discrimination in employment, housing, and public accommodations based on, *inter alia*, sexual orientation.[2] Among other things, the HRO requires that those seeking roommates in one-bedroom apartments and devoutly religious employers and landlords accept homosexuals on an equal basis. Jt. App. 416-17; 673-79.

Following the enactment of the HRO, a group of Cincinnati citizens formed an organization called "Take Back Cincinnati" for the purpose of circulating petitions and gathering signatures sufficient to place on the ballot a proposed amendment to the Cincinnati city charter. The purpose of the charter amendment is to repeal the EEO Ordinance and the HRO insofar as both ordinances grant protected status to persons on the basis of sexual orientation, and to prevent the City Council and any City officials from according such status or other preferential treatment on the basis of sexual orientation. On November 2, 1993, the citizens of Cincinnati voted to amend the city charter by adopting Issue 3. The measure, which the electorate approved by a vote of 56,416 to 34,472, or approximately 62% to 38%, reads as follows:

> NO SPECIAL CLASS STATUS MAY BE GRANTED BASED UPON SEXUAL ORIENTATION, CONDUCT OR RELATIONSHIPS. The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment.
>
> This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect.

[2] The HRO makes it unlawful to discriminate against individuals on the basis of "race, gender, age, color, religion, disability status, sexual orientation, marital status, or ethnic, national or Appalachian regional origin." Jt. App. 670.



Besides the HRO and EEO Ordinance, there is no evidence of any Cincinnati program or policy that would be affected by Issue 3.

## II. The Proceedings in the District Court

On November 8, 1993, five individual named homosexuals and two organizations – Equality Foundation of Greater Cincinnati, Inc. and H.O.M.E., Inc. ("petitioners") – filed a complaint seeking to block the amendment from taking effect on the grounds that Issue 3 allegedly violates their rights under the Equal Protection Clause and the First Amendment to the United States Constitution. The district court permitted an organization called Equal Rights, Not Special Rights ("ERNSR") and three named individuals ("respondents") to intervene in the case as defendants. ERNSR is the successor organization to "Take Back Cincinnati," and led the campaign to have Issue 3 adopted as a charter amendment.

On August 9, 1994, after five days of testimony, the district court permanently enjoined the charter amendment and held that Issue 3 infringes petitioners' right to participate equally in the political process; that gays, lesbians and bisexuals belong to a quasi-suspect category triggering the application of heightened scrutiny analysis

under the Equal Protection Clause; and that Issue 3 gives effect to private prejudice and is insufficiently linked to any legitimate governmental interest. With respect to petitioners' First Amendment claims, the district court held that Issue 3 violates petitioners' First Amendment right to free speech and association and their right to petition the government for redress of grievances. The district court also held that Issue 3 is unconstitutionally vague.

The district court also opined that Issue 3 encourages private prejudice and is designed to harm homosexuals, who the court believed were politically unpopular. Pet. at 61a-62a, 62a n.7, 64a and 96a. The district court made clear that its conclusions regarding the intent and effect of Issue 3 were based solely on its text. Pet. at 96a-97a. Due to binding circuit precedent, *Arthur v. Toledo*, 782 F.2d 565, 574 (6th Cir. 1986), the district court expressly eschewed any attempt to discern the voters' "intent" – prejudicial or otherwise. Pet. at 62a n.7. Although the scope and manner of the Issue 3 campaign concededly were irrelevant to the legal issues presented, the district court nonetheless found that ERNSR campaign materials were "grossly inaccurate" and "riddled with unreliable data, irrational misconceptions and insupportable misrepresentations about homosexuals." Pet. at 62a and 96a.[3]

[3] The only examples the district court could find to support these accusations related to its own rhetorical disagreement with the Issue 3 campaign on such matters as whether a group's inclusion in the protection of civil rights laws constitutes "special rights," whether homosexuals differ from other groups who are protected because their class is defined by sexual behavior, and whether the Supreme Court's suspect class analysis provides an appropriate guide for determining which groups are deserving of protection under civil rights laws. Pet. at 62a-63a. This is simply disagreement about legal and political rhetoric, and has nothing at all to do with "misrepresentations about homosexuals" or their lifestyle. Pet. at 62a. The reason the district court was unable to cite misrepresentations about the lifestyles or practices of homosexuals is because every public pronouncement of the ERNSR campaign dealt directly with the legal and political question of whether homosexuals should receive special civil rights protections.

The undisputed evidence established that the issue of AIDS was mentioned by anyone, even indirectly, exactly four times in the campaign. The only other discussion of any aspect of homosexual lifestyle or sexuality was confined to a few pamphlets and books which, the undisputed testimony established, were distributed to no more than 20 people, were never referred to by anyone associated with ERNSR, and thus could not possibly have had any effect on voters' attitudes on Issue 3. *See* Jt. App. 418-19; 429-30; 471-73. *See also* Jt. Exh. V, at 114-16, 156-67. In all events, the undisputed evidence showed that there was no "unreliable" or false factual "data" in any of these pamphlets.



## III. The Proceedings in the Court of Appeals

On May 12, 1995, the United States Court of Appeals for the Sixth Circuit reversed the judgment of the district court and vacated the district court's permanent injunction against implementation and enforcement of Issue 3, thereby permitting the citizens of Cincinnati, instead of the City Council, to determine democratically the efficacy of granting protected status to homosexuals under the City's anti-discrimination laws. Pet. at 26a-45a and 46a-108a. The court of appeals concluded at the outset of its opinion that since "most, if not all, of the lower court's findings . . . constituted ultimate facts and interrelated applications of law, sociological judgments mixed questions of law and fact, and/or fact, and findings designated to support 'constitutional facts' " – such findings were subject to plenary review. Pet. 33a.

Rejecting the district court's contention that Issue 3 denied petitioners their "fundamental right to equal participation in the political process," the court of appeals held that Issue 3 deprived "no one of the right to vote, nor did it reduce the relative weight of any person's vote," and enabled homosexuals to continue to vote for City Council members and to lobby those Council members concerning issues of interest. Pet. at 40a-41a. Importantly, the only effect upon the citizens of Cincinnati mentioned by the district court "was to render futile the lobbying of Council for preferential enactments of homosexuals *qua* homosexuals because the electorate placed the enactment of such legislation beyond the scope of Council's authority" – an effect which the Sixth Circuit declared, "does not rise to constitutional dimensions." Pet. at 41a. The Sixth Circuit concluded "that those who opposed Issue 3 simply lost one battle of an ongoing political dispute." *Id.* Moreover, far from "altering" the political process within the City of Cincinnati, Issue 3 is a straightforward and unexceptional example of how the political process works.

The court of appeals also rejected the district court's "novel" conclusion that homosexuals comprise a "quasi-suspect" class. Pet. at 35a. Joining "every circuit court which has addressed the issue," the Sixth Circuit concluded that "homosexuals are entitled to no special constitutional protection . . . because the conduct which places them in that class is not constitutionally protected." *Id.* The Sixth Circuit opinion rejected the notion that homosexuals are distinguished by their "sexual orientation" rather than by any particular conduct, and noted that neither Issue 3 nor other laws can successfully be drafted to burden or penalize a particular group "whose identity is defined by subjective and unapparent



characteristics such as innate desires, drives and thoughts." Pet. at 36a.

Lastly, the court of appeals held that the district court "erroneously ruled that [Issue 3] did not rationally relate to any permissible purpose" and that there were legitimate governmental interests advanced in Issue 3. Pet. at 43a-44a. The court of appeals concluded that Issue 3 "furthered a litany of valid community interests," including: (1) the encouragement of associational liberty of Cincinnati citizens by eliminating exposure to the punishment mandated by the HRO against those who elected to disassociate themselves from homosexuals; (2) the reduction of governmental regulation of the private and economic conduct of Cincinnati citizens; (3) the expansion of the degree of personal autonomy and collective popular sovereignty legally permitted with respect to questions of individual conscience, private religious convictions and other profoundly personal and deeply fundamental moral issues; and (4) the return of the municipal government to a position of neutrality with respect to homosexuality. *Id.*[4] The court of appeals also properly rejected the district court's conclusion that Issue 3 violated the First Amendment and was void for vagueness.

During the pendency of the Sixth Circuit appeal, on March 8, 1995, the City Council amended the HRO to

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[4] In addition, the court of appeals also noted, "Even if [Issue 3] is construed to reflect the majority's moral views respecting homosexuality, the Supreme Court has dictated such articulations to constitute a legitimate governmental interest. *Bowers [v. Hardwick]*, 478 U.S. [186,] at 196, 106 S. Ct. 2846 [(1986)] (a state criminal sodomy statute is justified as an expression of the belief of the electoral majority that homosexuality is immoral)." Pet. at 44a n.10.

eliminate any protections for "sexual orientation" discrimination, thus clarifying that neither heterosexuals nor homosexuals may seek the special protections of that law.

On June 17, 1996, this Court granted a petition for a writ of certiorari, vacated the decision of the Sixth Circuit, and remanded the case for further consideration in light of its decision in *Romer v. Evans*, 517 U.S. 620 (1996).

On remand, the Sixth Circuit concluded that Issue 3 satisfied the constitutional standard announced in *Romer*. The court of appeals concluded that Amendment 2 and Issue 3 "involved substantially different enactments of entirely distinct scope and impact, which conceptually and analytically distinguished the constitutional posture of the two measures." Pet. at 9a. Applying the equal protection principles announced in *Romer*, the court of appeals concluded that Issue 3 suffered none of the constitutional defects that rendered Amendment 2 invalid. Specifically, the Sixth Circuit explained that whereas Amendment 2 " 'prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect the named class,' " Pet. at 10a (quoting *Romer*, 517 U.S. at 624), "the Cincinnati Charter Amendment [Issue 3] constituted a direct expression of the local community will on a subject of direct consequences to the voters." Pet. at 15a. Extending *Romer* to invalidate purely local referenda of this sort "would disenfranchise the voters of their most fundamental right which is the very foundation of the democratic form of government, even through the lowest (and most populist) organs and avenues of state government, to vote to override or preempt any policy or practice implemented or contemplated by their subordinate civil servants to bestow special rights, protections, and/or privileges



upon a group of people who do not compromise a suspect or a quasi-suspect class and hence are not constitutionally entitled to any special favorable legal status." Pet. at 17a-18a. Moreover, the Sixth Circuit held that in contrast to Amendment 2's " '[s]weeping and comprehensive' " language, Pet. at 10a (quoting *Romer*, 517 U.S. at 627), Issue 3's "narrow, restrictive language could not be construed to deprive homosexuals of legal protections even under municipal law, but instead eliminated only 'special class status' and 'preferential treatment' for gays as gays under Cincinnati ordinances and policies, leaving untouched the application, to gay citizens, of any and all legal rights generally accorded by the municipal government to all persons as persons." Pet. at 13a-14a.[5]

The Sixth Circuit also concluded that Issue 3 was rationally related to legitimate governmental interests. The court of appeals noted that this Court had rejected the interests cited by the defendants in *Romer* because "[t]he breadth of the Amendment [was] so far removed from these particular justifications that . . . it [was] impossible to credit them." Pet. at 19a (quoting *Romer*, 517 U.S. at 635). The Sixth Circuit explained that "[a] state law which prevents local voters or their representatives, against their will, from granting special rights to gays, cannot be rationally justified by cost savings and associational liberties which the majority of citizens in those communities do not want." Pet. at 20a. In contrast, Issue 3 "constituted local legislation of purely local scope." *Id.* The court elaborated: "[a]s such, the City's voters had

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[5] Contrary to petitioners' assertion, the court below expressly noted that "the *Romer* Court did not rely upon the potential universally exclusive effect to invalidate the measure. . . . " Pet. 11a.

clear, actual, and direct individual and collective interests in that measure, and in the potential cost savings and other contingent benefits which could result from that local law." *Id.* Specifically, the court held that one legitimate governmental interest that was reasonably related to the passage of Issue 3 was the elimination of expenditures of "public and private resources to guarantee and enforce non-discrimination against gays in local commercial transactions and social intercourse." *Id.*

On February 5, 1998, the full Sixth Circuit rejected petitioners' suggestion for rehearing *en banc*. Pet. App. 126a. Judge Boggs wrote a concurrence in which he stated, "*Romer's* holding is simple: a state may not, by constitutional amendment, prohibit a municipal government from enacting ordinances conferring benefits or protections on gay residents." Pet. App. 127a. Specifically, Judge Boggs recognized that "if in *Romer* the Supreme Court held that cities may choose to enact gay-right ordinances without nullification by state constitutional amendment, it did not hold that cities *must* choose to do so. It is not constitutionally offensive that over time some cities (*e.g.*, Aspen, Boulder, and Denver) will pass such ordinances, while others (*e.g.*, Cincinnati) will not." Pet. App. at 128a (emphasis in original). Additionally, Judge Boggs provided several examples of the litany of legitimate governmental interests that were advanced by Issue 3, such as a desire to avoid increased legal exposure for small businesses, the advancement of libertarian beliefs, the fear of increased covert discrimination, and the exercise of associational rights by individual citizens.

Judge Gilman, writing on behalf of five other members of the court of appeals, filed a dissent.



## REASONS FOR DENYING THE WRIT

### I. Petitioners Have Failed To Satisfy Any of The Traditional Grounds Warranting This Court's Review.

Petitioners' sole basis for seeking review in this Court is their contention that the surface similarities between Issue 3 and Colorado's Amendment 2, struck down in *Romer v. Evans*, 517 U.S. 620 (1996), render Issue 3 *ipso facto* unconstitutional. Petitioners, however, never even attempt to refute the Sixth Circuit's thoughtful and painstaking explanation of why, notwithstanding this superficial resemblance, Issue 3 fundamentally differs from Colorado's Amendment 2 and therefore does not run afoul of either the letter or underlying rationale of the Court's *Romer* decision. Nor can petitioners credibly maintain that the Sixth Circuit's decision has doctrinal or public policy significance beyond the four corners of this case or is otherwise necessary to maintain uniformity of decisions with other federal courts. The decision obviously has no such broader significance since it is plainly not in tension with any opinion of any other federal court and no law analogous to Issue 3 has ever been enacted anywhere else. That being so, petitioners have failed to satisfy any of the traditional grounds for granting a petition for a writ of certiorari. In short, to the extent there is any ambiguity as to the scope of this Court's decision in *Romer*, these issues should be resolved in the first instance by the lower federal courts in discrete factual contexts.

## II. Issue 3 Is Fully Consistent With *Romer's* Equal Protection Principle.

In *Romer*, this Court held that Colorado's statewide effort to force local communities, against their will, to deny homosexuals any opportunity for a "claim of discrimination" constituted a "literal violation" of the Equal Protection Clause and was unsupported by a rational basis. *Romer*, 517 U.S. at 627-36; Pet. at 14a-15a, 17a-20a. In this case, the people of a local community have decided for themselves not to grant homosexuality the "minority or protected status" that the local city council had bestowed on it approximately one year before. Petitioners' effort to extend *Romer* to this purely local measure thus necessarily rests upon one of two wholly untenable understandings of the Fourteenth Amendment: either (1) the Equal Protection Clause prohibits any decision to repeal or foreclose laws granting homosexuals "minority or protected status" or (2) it prohibits local electorates from directing their employee representatives to deny such status, even though those representatives themselves can voluntarily deny protected status to homosexuals. The first proposition is belied by both common sense and the decision of the United States Congress and 41 states to decline to confer protected status upon homosexuals. Petitioners' second contention would turn the "critical postulate that sovereignty is vested in the people" on its head. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 794 (1995). Petitioners' argument rests on the bizarre contention that the people of Cincinnati are constitutionally disabled from doing precisely what the Cincinnati City Council may do. Nothing in this Court's decision in *Romer*, however, suggests, much less compels, such a patently erroneous result.



*Romer* merely held that each locality was entitled to decide for itself the contentious political issue of granting protected status to homosexuals. Petitioners seek to convert this straightforward principle into a *uniform, national requirement* that would disable all localities from repealing or denying civil rights protections for homosexuals. Specifically, petitioners maintain that Issue 3 violates the Fourteenth Amendment because it makes it "more difficult" for homosexuals to obtain "minority or protected status."[6] Particularly since *Romer* expressly disclaimed the notion that it was bestowing "special rights" on homosexuals, but was announcing a general equal protection principle applicable to all groups, petitioners' proposed reading of that decision would render invalid every referendum creating classifications which "disadvantage" *any* group relative to others. Under this view, gun owners, smokers, teenagers and any other "group" could challenge any local law that does not extend to them a government benefit available to others. Any such limitation on government aid would necessarily make it "more difficult" – indeed, impossible – for the affected group to "seek aid from the government." 517 U.S. at 633. As the *Romer* court emphasized, however, "*most* legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." 517 U.S. at 631 (emphasis added). So long as the distinction drawn does not disadvantage a suspect class and rationally

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[6] Although petitioners boldly proclaim that it is clearly "more difficult" to reverse the electorate's decision on denying gay rights than to reverse an analogous city council decision, they offer no objective support for this proposition. The "difficulty" identified in *Romer*, forcing appeals to citizens that were strangers to the community, is not implicated in any way by Issue 3.

advances a legitimate governmental interest, the law does not violate the Equal Protection Clause. As the court of appeals found, Issue 3 amply satisfies these requirements.

Nothing in *Romer* (or any other of this Court's opinions) in any way suggests that the substantive decision to exclude homosexuality from civil rights protections extended to other criteria is inherently irrational or that such a permissible substantive decision somehow becomes transformed into a "literal violation" simply because it is made by the people through popular referendum, rather than elected representatives exercising their *delegated* powers. Rather, as the Sixth Circuit correctly noted, the only identified flaw in Colorado's Amendment 2 was that the state imposed a uniform view of homosexuals' entitlement to "claims of discrimination" on all local communities. Pet. at 12a. This statewide coercion both created a "special disability" for homosexuals by forcing them alone to "enlist[ ] the citizenry of Colorado to amend the state constitution" and rendered Amendment 2 irrational because "[a] state law which prevents local voters or their representatives, against their will, from granting special rights to gays, cannot be rationally justified by cost savings and associational liberties which the majority of citizens in those communities do not want." *Romer*, 517 U.S. at 631; Pet. at 20a. Moreover, the dissenting opinion in *Romer* characterized, without correction, the majority opinion as holding that the constitutional harm was the state's resolution of a local issue.[7] Thus,

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[7] *See, e.g.*, 517 U.S. at 639-40 ("the same 'rational basis' . . . which renders constitutional the *substantive discrimination* . . . also automatically suffices to sustain what might be called the *electoral – procedural discrimination* against them (i.e., the fact that they must go to the *state level* to get this changed).") (emphasis in original); *id.* at 647 ("because such a law prevents the adversely affected group – whether drug addicts, or smokers, or gun owners, or motorcyclists – from changing the policy thus established in 'each of [the] parts' of the *state*.") (emphasis added).



*Romer* simply condemned state efforts to prevent local communities from taking diverse approaches to the issue of gay rights protections. It plainly does not, as petitioners assert, impose a national *requirement* that local communities *uniformly* grant (or at least not repeal) such protections.

Petitioners maintain that the Sixth Circuit's decision "supports the remarkable contention . . . that application of equal protection principles depends on the level of government at which the challenged action takes place." Pet. at 24. But nothing in the decision below supports such a notion or otherwise suggests that equal protection scrutiny is somehow less rigorous for local communities than it is for states. The Sixth Circuit simply recognized that there is a difference under *Romer* between state interference with local decisionmaking and democratic resolution of local issues by the local community itself. Thus, the application of the *same* equal protection principles to these different situations may and should lead to different results. The question here, however, is whether *Romer* will be grossly extended to hold that the *electorate's* "interference" with the policy decisions of its subordinate representatives is somehow forbidden by a Constitution premised on popular sovereignty.

No case anywhere at any time has ever embraced the heresy that the people of a community cannot order their legislature to take action permitted by the Constitution. As Justice Scalia observed,

> [T]he consequence of holding this provision unconstitutional would be that nowhere in the

> country may the people decide, in democratic fashion, not to accord special protection to homosexuals. Unelected heads of city departments and agencies, who are in other respects (as democratic theory requires) subject to the control of the people, must, where special protection for homosexuals are concerned, be permitted to do what they please. This is such an absurd proposition that *Romer*, which did not involve the issue, cannot possibly be thought to have embraced it.

*Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 518 U.S. 1001 (1996) (Scalia, J., dissenting). Although it is certainly true that "popular referendum[s] [are not] *immunize[d]*" from constitutional scrutiny, *Hunter v. Erickson*, 393 U.S. 385, 392 (1969) (emphasis added), it is plainly wrong to suggest that Issue 3 is unconstitutional *solely because* it was directly enacted by the people of Cincinnati.

There is, however, support for the proposition that statewide repeals of local laws aimed at addressing local problems can create special disabilities that violate the Equal Protection Clause. For example, in *Washington v. Seattle School Dist., No. 1*, 458 U.S. 457 (1982), this Court struck down a statewide anti-busing initiative because "[b]y placing power over desegregative busing at the state level," the "initiative lodg[ed] decision making authority over the question at a new and remote level of government." 458 U.S. at 479, 483. Like the homosexuals in Aspen and Boulder, "proponents of desegregative busing in smaller communities such as Tacoma or Pasco [needed to] obtain statewide support . . . to desegregate the schools in their communities." *Id.* at 484 n.27. In short, the only identified injury in *Romer* or *Seattle* was that a local issue had been removed to the "*state level*," a



"new and remote *level* of government." *Id.* at 479, 483 (emphasis added). As a purely local measure, Issue 3 does not create any such disability.

It is therefore necessarily constitutional because, as the Sixth Circuit correctly noted, nothing in *Romer* supports the bizarre proposition that the local electorate is constitutionally *inferior* to its employee representatives and thus somehow has more limited authority to make gay rights decisions than the city council, which derives all its authority from that electorate. Pet. at 17a-18a. To the contrary, *Romer* never hints that Amendment 2's constitutionality was affected because it was embodied in a citizen's initiative, rather than legislative enactment, and this Court has often rejected the notion that the constitutionality of a measure could possibly be adversely affected because it was the product of direct democratic action. As the Court recently stated, "[w]e are aware of no case that would even suggest that the validity of a state law under the Federal Constitution would depend at all on whether the state law was passed by the state legislature or by the people directly through amendment of the state constitution." *U.S. Term Limits*, 514 U.S. at 809 n.19; *see also* Pet. at 15a-16a (and cases cited). As the Court in *James v. Valtierra*, 402 U.S. 137, 142 (1971), explained with respect to a local referendum:

> But of course a lawmaking procedure that "disadvantages" a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all because they would always disadvantage some group.

Thus, Amendment 2 imposed an unconstitutional "special disability" solely because it meant that homosexuals in electoral subunits like Aspen could achieve civil

rights protections "only by enlisting the citizenry of Colorado to amend the state constitution . . . no matter how local or discrete the harm." *Romer*, 517 U.S. at 631. But *Romer* in no way suggested that it was in any way problematic for the *local* electorate to make a local decision, thus necessitating "enlisting" them to reverse that decision. Nor could it have done so without violating the "critical postulate that sovereignty is vested in the people." *U.S. Term Limits*, 514 U.S. at 794. Rather, the people have the unfettered authority to guide their representatives' efforts towards any constitutionally permissible end: they may require their legislators to take any action the Constitution does not forbid or, as here, forbid them from taking any action the Constitution does not require.

This basic truth was noted as early as *Marbury v. Madison*: "[T]he people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness. . . . " 5 U.S. (1 Cranch) 137, 176 (1803). More recently, the Court has observed that "[t]he referendum . . . is a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies. The practice is designed to 'give citizens a voice on questions of public policy.' " *City of Eastlake v. Forest City Enters.*, 426 U.S. 668, 673 (1976) (quoting *James*, 402 U.S. at 141); *see also James*, 402 U.S. at 141 ("Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice.").

The people of various localities are thus entirely free to use their constitutions and charter amendments to prevent their local legislatures from passing laws that the people find unwarranted or inappropriate. This, indeed, is what constitutions do. The federal Constitution, and in particular the Bill of Rights, is nothing more than a series



of directives from the sovereign people to their employee representatives regarding the types of laws the representatives may enact. According to petitioners' logic, the First Amendment's directive to "Congress" that it "shall make no law respecting an establishment of religion," grossly violates the rights of those who desire or benefit from religious establishments because it makes it "more difficult for [one] group of citizens than for all others to seek aid from the government." Thus, laws akin to Issue 3 are not only "within our constitutional tradition," they are within our Constitution. *Romer*, 517 U.S. at 633. Just as the First Amendment permissibly constrains federal representatives from passing laws that interfere with the people's freedom to act on their religious beliefs, so too does Issue 3 permissibly direct Cincinnati representatives not to pass laws that interfere with the people's freedom to act on their religious or other beliefs concerning homosexual behaviors and lifestyle.

To be sure, *Romer* stated that each level or "part" of government within a state must be free to decide gay rights issues for themselves, but this hardly suggests that each *component* of government *within* a local subunit must be free to make gay rights decisions contrary to their superior's directives. As the Sixth Circuit noted, were it otherwise, the Cincinnati City Council could not direct the *City Manager* to reverse his gay rights policies because it would then be "more difficult" for homosexuals to seek aid from the government. Pet. at 16a-17a n.9. But since the Cincinnati City Council is superior to the city bureaucracy within the local governmental structure, it may command the city bureaucracy not to extend any benefits to certain groups unless those benefits are constitutionally mandated. By the same token, since the citizens of Cincinnati are superior to the city council within the

local governmental structure, they may command the city council not to extend any benefits to certain groups unless those benefits are constitutionally mandated.

Indeed, extending *Romer's* equal protection principle to invalidate local electoral decisions would be even more revolutionary than the Colorado Supreme Court's "fundamental political rights" theory that the *Romer* Court refused to embrace. 517 U.S. at 625. As petitioners correctly note, the *Romer* principle articulates a "literal violation" of the Equal Protection Clause, and consequently, no justification can save it. Pet. at 15. Thus, particularly since gays enjoy no "special" equal protection rights, local electorates would be powerless to deny *any* demand by *any* special interest group (not just "independently identifiable groups"), no matter how compelling the reason for rejecting it or how unworthy the group. Under petitioners' Equal Protection Clause, local communities could not, for example, ban veteran preferences even if they believed they had an unwarranted disparate impact on females. *Cf. Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979). Any such action would make it "more difficult for one group of citizens [veterans] than for all others to seek aid from the government" and thus would be "a denial of equal protection of the laws in the most literal sense." Pet. at 15 (quoting *Romer*, 517 U.S. at 633).

As this example illustrates, moreover, the Equal Protection regime hypothesized by petitioners would not only invalidate virtually all democratic policy choices, but would quite literally be impossible to implement. Government simply cannot be "open and impartial" to *all* competing groups because such groups often make *conflicting* demands. 517 U.S. at 633. If the Cincinnati electorate or City Council adopts veteran preferences, it is not



open and impartial to women's groups seeking the government's assistance in ending a regime with such an identifiable disparate impact. But if the City Council favors the women's groups, it will not be open and impartial to veterans' groups. If it favors unions in city employment it will have closed its doors to non-union members (and vice versa); if it favors gun owners, it will have closed its doors to gun-control advocates (and vice versa); if it grants preferential treatment to any group, it will have closed its doors to the other adversely affected groups seeking nondiscriminatory treatment (and vice versa).

Contrary to petitioners' attempted distortion, then, the Sixth Circuit did not suggest that local electorates are constitutionally superior to local or state governments, but only that they are constitutionally *equivalent* and thus a law is not rendered unconstitutional simply because it is enacted by the people. Since the Cincinnati City Council and other municipal legislatures in Colorado are concededly free to disagree with the Aspen City Council about the desirability of gay rights protections, the Cincinnati electorate is also constitutionally free to disagree with Aspen about the desirability of such laws. If petitioners had enacted gay rights *protections* through a Charter Amendment, rather than a municipal statute, this would obviously not affect the constitutional analysis of that enactment, and there is no principled reason for a different result here.

We note that if all of the foregoing is wrong and *Romer* does in fact prohibit local electorates from making the same policy decisions as their representatives, then this Court should reconsider its decision in that case.

## III. Issue 3 Is Rationally Related to Legitimate Government Interests.

Petitioners also maintain that Issue 3 simply must be irrational because *Romer* holds that all laws excluding only homosexuality from otherwise available civil rights protections cannot be supported by the legitimate interests in easing the financial burdens of civil rights enforcement and enhancing associational freedoms, but must be deemed to reflect nothing but irrational "animus." Pet. at 18-22. The short answer to this contention is that Issue 3 is supported by all the legitimate interests that have motivated Congress and 41 state legislatures to exclude homosexuality from the civil rights protections granted on the basis of numerous other criteria, as well as the interests supporting any legislative decision to repeal only homosexuality as a protected category. As the Court has often noted, there is no cognizable difference between a decision to repeal an existing protection that is not constitutionally mandated and a decision not to enact such a protection in the first place. Indeed, it is incontrovertible that "the Equal Protection Clause is not violated by the mere repeal of [civil rights] legislation or policies that were not required by the Constitution in the first place." *Crawford v. Board of Educ. of City of Los Angeles*, 458 U.S. 527, 538 (1982). *See also Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 414 (1977) ("If the Board was not under such a duty, then the rescission of the initial action in and of itself cannot be a constitutional violation."). Since it is implicitly conceded that *Romer* did not invalidate *legislative* denials or repeals, this conclusively establishes that such "singling out" of homosexuality for "disadvantageous" treatment is not irrational or a product of impermissible *animus*. *See* Pet. at 14a n.8.



Indeed, all the reasons that support a decision to exclude homosexual orientation from generally applicable nondiscrimination laws such as Title VII, or to repeal previously-enacted protections of this sort, necessarily also support popular amendments instructing legislators not to enact, and to repeal, such protections. If such popular initiatives *necessarily* rest on impermissible motivations, so too does legislation embracing precisely the same decision. And if government is constitutionally compelled to enact (or at least retain) prohibitions against *private* discrimination, then necessarily government *itself* must also refrain from discriminating against homosexuals in laws and policies governing marriage, child custody, adoption, and the like. But *Romer*, of course, did not suggest that legislative repeals of civil rights protections were problematical, much less *per se* irrational. Nor did it suggest that there was anything irrational about laws directly discriminating against homosexuals in such matters as marriage, but all such laws are necessarily premised on nothing other than moral reservations about homosexuality. Thus, contrary to petitioners' suggestion, *Romer* cannot stand for the general condemnation of all government actions which withdraw civil rights protections for gays, so each case must be judged on its own merits.

As the Sixth Circuit correctly noted, *Romer* did not and could not suggest that exclusion of homosexuality from civil rights laws fails to further a political jurisdiction's legitimate interest in preserving the financial resources of those defending and enforcing civil rights suits or preserving citizens' traditional freedom to associate with employees, tenants or roommates of their choice. Pet. at 21a. It simply held that these interests, given the "breadth of the Amendment," were so "far removed from

these particular justifications" that the Court could not "credit them." *Romer*, 517 U.S. at 635. The *reason* the interests supporting Amendment 2's sweeping prohibition were so attenuated and not credible is because they were imposed by people *outside* of Aspen and similar communities, who did *not* suffer such costs or deprivations, on people *within* the local communities who were perfectly willing to expend their tax dollars and sacrifice their personal freedoms to the cause of gay rights. 517 U.S. at 635; Pet. at 19a. Strangers to Aspen have no legitimate or plausible interest in "protecting" Aspen's citizens from their own local democratic processes, so the only possible justification for Amendment 2 was irrational *animus*. But this rationale has no application where, as here, those burdened by the law are the same people who struck the balance between costly deprivations of freedom and gay rights.

In such circumstances, laws denying homosexuality "minority or protected status" are eminently reasonable. There is always a trade-off between expanding civil rights laws and preserving both scarce financial resources and associational rights. Civil rights laws protecting homosexuals necessarily deny employers and landlords their traditional freedom to associate with whomever they please and to attach significance to a sexual behavior or lifestyle that they may believe is inappropriate or sinful. By prohibiting such government coercion, Issue 3 preserves the citizenry's traditional freedom to associate and to act on sincerely-held religious or moral beliefs concerning the propriety of certain behavior. While enhancing freedom is always rational, it serves a particularly compelling interest in the context presented here. Eliminating the liberty of landlords and employers to take account of homosexuality sends the unmistakable



message that homosexual behavior, like race, is a characteristic which only an irrational bigot would consider. By restoring government neutrality on this difficult and divisive moral issue, Issue 3 promotes freedom and diversity by allowing different groups in the community to hold, and act on, different views on this question. Thus, as Judge Boggs' opinion carefully explains, Issue 3 reasonably garnered the support not only of citizens who themselves had moral reservations about homosexuality but also of those who did not wish to interfere with the freedom of those who did possess such reservations. Pet. App. 129a.[8] In this regard, it is important to recognize that Issue 3 in no way authorizes, much less compels, any discrimination against any homosexual in any walk of life: it simply refrains from affirmatively prohibiting such action.[9]

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[8] While petitioners believe that homosexuality is morally irrelevant, that assertion is itself necessarily a profound, and controversial, moral judgment. Cincinnati has every right to not impose petitioners' moral code on others in the community who may disagree with it.

[9] Of course, although the issue is not presented here, even if Issue 3 did affirmatively penalize homosexuals because of the community's collective moral views, this would be eminently permissible under *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986). If the government has a rational and legitimate basis for imprisoning monogamous adults whose only crime is consensual sexual behavior in the privacy of their own apartments, it cannot be irrational for the government to take the far less draconian step of simply refraining from penalizing private actors who prefer not to rent their apartments to people who engage in such behavior. Indeed, it is manifestly irrational to conclude that the government must encourage and sanction homosexual relationships by granting them affirmative civil rights protections, but, at the same time, conclude that the government is entirely free to criminally penalize the natural,

Since Issue 3, unlike Amendment 2, therefore most certainly "can be explained by reference to legitimate public policies," rational basis review does not permit the federal judiciary to assume as a matter of law that 62% of Cincinnati voters were not motivated by such legitimate policies, but were stirred by "animus" or a " 'bare- . . . desire to harm' " homosexuals. *Romer*, 517 U.S. at 634, 644. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313-14 (1993). Contrary to petitioners' suggestion, federal courts cannot invalidate presumptively valid laws as reflecting "animus" *even though* those laws further reasonable policies, but may ascribe such impermissible motives only when, as in *Romer*, the Court concludes that no such reasonable ends support the challenged policy and thus the policy is necessarily "inexplicable by anything but animus." 517 U.S. at 632. *FCC v. Beach*, 508 U.S. at 314.

Apparently recognizing this, petitioners now seem to suggest that Cincinnati somehow forfeited the ability to advance the legitimate government interests served by Issue 3 unless it simultaneously did away with *all* civil rights protections on *all* bases. That is, petitioners suggest that Cincinnati cannot advance the cost savings and freedom-enhancing reasons served by Issue 3 because those same benefits would be derived from excluding, say, racial minorities from civil rights protections and Cincinnati did not exclude race as a protected criterion. Pet. at 10. It is self-evident, however, that the government may exclude, for example, drug addicts from the protections of civil rights laws without being constitutionally obliged

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consensual results of those relationships through sodomy laws. Yet this is precisely the state of constitutional incoherence that would result from petitioners' interpretation of *Romer*.



also to exclude women and racial minorities from such protections, even though the reasons justifying an exclusion of drug addicts could also support excluding these other groups. This is because it is a basic maxim of rational basis review that such line-drawing, establishing eligibility for scarce public benefits such as civil rights protections, "is a matter for legislative, rather than judicial, consideration." *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980); *Railway Express Agency, Inc. v. People of State of New York*, 336 U.S. 106, 110 (1949) ("It is no requirement of equal protection that all evils of the same genus be eradicated or none at all."). Thus, challenging the underinclusiveness of a legislative classification affords no grounds for invalidation under rational basis review.[10] Indeed, under petitioners idiosyncratic understanding of rational basis review, Issue 3's prohibition of *"preferential treatment"* for homosexuals is unconstitutional, since a similar disability is not imposed on blacks, women, veterans, city residents or any other group currently receiving such preferences in municipal employment.

In any event, it is unquestionably reasonable to treat homosexuality differently from other protected criteria, such as skin color and gender, because it is a behavior or lifestyle. It therefore can rationally be viewed as reflecting on "the content of one's character." Martin Luther

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[10] *See, e.g., Dandridge v. Williams*, 397 U.S. 471, 485 (1970) ("If the classification has some rational basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice, it results in some inequality.") (internal quotations omitted); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981); *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955).

King, Jr., Speech at the Civil Rights March on Washington, D.C. (Aug. 28, 1963). It is thus something to which eminently reasonable people can attach negative significance, pursuant to venerable moral and religious principles. The state, in turn, may rationally seek not to interfere with such principles or to equate them with racial bigotry.

To be sure, as petitioners note, a local community probably could not deny fire protection services only to senior citizens under the Fourteenth Amendment. Pet. at 22. But a community most assuredly may instruct its city council to exclude "old age" as a protected civil rights criterion, regardless of whether it also excludes race as a protected basis. Pet. at 22. It can do so pursuant to the same legitimate cost-benefit analysis which led the Cincinnati City Council to exclude "political affiliation" from the protections of the Human Rights Ordinance, even though, unlike homosexuality, such affiliation is constitutionally protected against governmental discrimination. *See* Pet. at 9a. Notwithstanding petitioners' campaign sloganeering, so limiting the scope of civil rights laws hardly renders the elderly or Republicans unequal to everyone else. It simply denies them an additional basis for invoking "minority or protected status." Similarly, a black lesbian Democrat has the same right as all other Cincinnati citizens to allege racial or gender-based discrimination, but cannot invoke either her political affiliation or, after Issue 3, her homosexuality as an *additional* basis for claiming "minority or protected status." This does not create any unconstitutional inequality particularly since, as the Sixth Circuit correctly recognized, Issue 3 was carefully limited to deny homosexuals only "special class status" and "minority or protected status" – in contrast to Amendment 2's sweeping deprivation of



any potential "claim of discrimination." Pet. at 12a-13a. This ensures that Issue 3 cannot be construed to deny homosexuals the benefits of generally applicable laws – the result that so troubled the *Romer* court. *Romer*, 517 U.S. at 623, 629-33; Pet. at 9a-13a.

Thus, all Issue 3 does is eliminate an *additional* legal basis for challenging any adverse action – *i.e.*, discrimination on the basis of homosexuality. Such additional legal protections are indeed special rights because many characteristics, behaviors and lifestyles protected by the Constitution and/or federal civil rights law – political affiliation, illegitimacy, drug addiction, alcoholism – are unprotected by the Human Rights Ordinance or any other Cincinnati law prohibiting private discrimination. Indeed, prior to the enactment of the Human Rights Ordinance in 1992 – which it is uncontested was passed, and has been used, solely to prohibit homosexual discrimination – no Cincinnati law prohibited even racial or gender-based discrimination. Thus, in the wake of Issue 3, homosexuals are in precisely the same position they and all other groups were in prior to passage of the Human Rights Ordinance, and in precisely the same position as homosexuals in 41 states and federal courts – without special protections for one characteristic which defines one of the societal groups to which they claim membership. This is in stark contrast to Amendment 2, which was enacted against a backdrop of a diverse patchwork of well-established protections for homosexuals, and well-entrenched protections for an "extensive catalogue of traits" other than homosexuality. *Romer*, 517 U.S. 628-30. Unlike Amendment 2, then, Issue 3 does not make homosexuals a "stranger to its laws," but simply does not add to Cincinnati laws an additional protection with the

specific purpose and effect of aiding homosexuals *qua* homosexuals. *Romer*, 517 U.S. at 635.

Notwithstanding petitioners' apocalyptic contrary rhetoric, then, the Sixth Circuit was entirely correct that Issue 3 simply fails to bestow on homosexuals an additional protection premised on their status as homosexuals, but it in no way denies them the benefits of civil service or other laws available to others.

Finally, the fact that Issue 3 is contained in a popularly-enacted Charter Amendment, rather than a legislatively-enacted repeal, does not render it any more "discriminatory" than a legislative repeal or otherwise affect the constitutional analysis. All concede that the *only* way Cincinnati citizens can make policy determinations concerning what their laws should be is by drafting laws instructing the City Council on the permissible scope of its law-making powers. Thus, invalidating Issue 3 because it is phrased as a directive to the legislature on the scope of permissible laws is no different than prohibiting citizens from governing themselves.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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